BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF:

N.J.B., *the Student, and*
S.B., *the Student's parent,*
***Petitioners*,**
v.

MURFREESBORO CITY SCHOOLS,
Respondent.

DOCKET NO: 07.03-122520J

FINAL ORDER

This matter was heard before Joyce Carter-Ball, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division, pursuant to T.C.A. §49-10-606 and Rule 520-1-9-.18. Attorney John D. Kitch represented the Respondent, Murfreesboro City Schools (hereinafter referred to as "MCS"). The Petitioners were represented by Attorney Marcella G. Derryberry and Attorney Jack W. Derryberry, Jr.

The subject of this proceeding is whether MCS provided a Free Appropriate Public Education ("FAPE") to "N.J.B" (hereinafter referred to as "Petitioner"); whether MCS violated the IDEA; whether MCS complied with the procedures of the Act; whether N.J.B's IEPs were reasonably calculated to enable him to receive some educational benefit; and whether Petitioners are entitled to the relief sought or to any relief.

After consideration of the entire record, testimony of witnesses, and the arguments of the parties, it is DETERMINED that MCS provided Petitioner a Free Appropriate Public Education; MCS did not violate the IDEA; MCS complied with the procedures of the Act; Petitioner's IEPs were reasonably calculated to enable Petitioner to receive some educational benefit, and

Petitioners are not entitled to the relief sought or to any relief. Murfreesboro City Schools is the prevailing party in this matter.

This determination is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Petitioner is a 10 year old student currently enrolled at Intermountain in Helena, Montana. Petitioner attended MCS, both at Northfield Elementary and Mitchell-Neilson Elementary.

2. Petitioner began showing disruptive behavior and having emotional difficulties in the third grade while enrolled at Northfield Elementary. An incident on November 7, 2012, resulted in a two-day out of school suspension for Petitioner.

3. MCS developed a crisis management plan, a functional behavior assessment, and a behavior intervention plan. After these documents were developed, Petitioner had another behavioral episode, which led to Petitioner being arrested. He spent a night in Juvenile Detention before his father ("Dr. B.") could get him admitted to Vanderbilt Psychiatric Hospital.

4. Vanderbilt diagnosed Petitioner as having Mood Disorder NOS and Disruptive Behavior Disorder NOS.

5. Dr. B. then requested that the School System evaluate Petitioner. After a thorough evaluation, Petitioner was determined to be eligible for special education. An IEP was developed on December 12, 2012, which Dr. B. signed in agreement. Dr. B. believed the goals in the IEP were adequate.

6. In an e-mail sent on December 17, 2012 to Kathryn Riddle, a private psychologist who had been treating Petitioner, and copied to Mary Beth Baker, the school psychologist, Dr. B. again raised fears about Petitioner's psychotic rages.

7. On February 15, 2013, Dr. Riddle rendered a psychological report. In that report Dr. Riddle noted that Petitioner's emotional distress and behaviors seemed worse at home than at school. Dr. B. agreed with everything in that report. Petitioner was making reasonable educational progress during this time.

8. The behavior problems continued into February of 2013. As a result of the behaviors, on February 28, 2013, the school had an IEP meeting to change Petitioner's placement. The meeting was held at the proposed new school, Mitchell-Nielson. An IEP Addendum was signed by all parties, including Dr. B., relocating Petitioner to a more restrictive setting at Mitchell-Neilson Elementary in MCS. The IEP developed on December 12, 2012 was not changed at that time.

9. Although there was concern from school personnel that the proposed new classroom at Mitchell-Nielson was not appropriate for Petitioner, Petitioner made academic progress after the transition to Mitchell-Neilson Elementary. Dr. B. acknowledged that Petitioner's grades at both Northfield Elementary and Mitchell-Neilson Elementary were commensurate with his intellectual ability.

10. Dr. Lloyd, the principal at Northfield Elementary, testified that Petitioner was a good student academically. Teresa Rotella, Petitioner's teacher at Northfield Elementary, testified that Petitioner was very good in all areas. She further stated that academically he was fine, and even when he had serious emotional issues, he was able to make up the work.

11. According to Robin Newell, the principal at Mitchell-Neilson Elementary, Petitioner did well academically at Mitchell-Neilson, although he was not there very long. She did not believe the Mitchell-Neilson Elementary program could be fairly judged because of the short time that Petitioner was enrolled there.

12. During this time, Petitioner became uncontrollable at home. He became physically violent and threatened to kill himself, which led Dr. B. to call the police to come to help with getting Petitioner admitted to Vanderbilt.

13. On March 6, 2013, a few days after the IEP for Mitchell-Neilson Elementary was signed, Dr. B. sent an e-mail to Mary Beth Baker, the school psychologist, stating in pertinent part, "If his violent behavior continues at home, I will arrange for him to attend a residential treatment facility and he will not live here".

14. On April 11, 2013, Dr. B. sent an e-mail to his health care insurer, stating in pertinent part, "It is unsafe to have [Petitioner] at home, unsafe for him and his sister, and I am concerned that it is unsafe for him to be at school....?"

15. As a result of this Petitioner was hospitalized from April 12 through April 18 at Vanderbilt Psychiatric Hospital on emergency admission by his father.

16. After seven days at Vanderbilt Psychiatric Hospital, Petitioner was transferred to Laurel Heights Treatment Center in Atlanta. On April 16, 2013, Counsel for Petitioners sent a letter to MCS regarding this placement, and that Dr. B. would seek reimbursement for Laurel Heights. The letter made no mention of any other facility.

17. Petitioner was sent to Laurel Heights on April 18, 2013. Then, on April 26, 2013, Dr. B. sent an e-mail to MCS Director of Schools and the Principal of Mitchell-Neilson Elementary to inform them that he was disenrolling Petitioner from MCS and that he had enrolled Petitioner in Laurel Heights.

18. Dr. B. testified that Petitioner's academic performance and presumably his educational progress had nothing to do with the decision to remove Petitioner from Mitchell-Neilson Elementary.

19. Less than one month after sending Petitioner to Laurel Heights, Dr. B. moved his fiancé into his home.

20. Dr. B. was displeased with Laurel Heights because Petitioner's behaviors did not improve there. On June 12, 2013, Dr. B. committed to place Petitioner at Intermountain in Helena, Montana. He signed an intake form with Intermountain on that date, and on August 1, 2013, Dr. B. entered into an agreement with Intermountain. In the **agreement with Intermountain**, the **focus was all on treatment.**

21. Petitioner was discharged from Laurel Heights on July 31, 2013, and was admitted to Intermountain the next day, August 1. Counsel for MCS received notice of the proposed placement at Intermountain in mid to late July from Petitioners' counsel.

22. The Initial Treatment Plan at Intermountain focused **primarily on treatment**; only minor references were made in regard to Petitioner's education.

23. The Initial Treatment Plan at Intermountain estimated the length of the stay to be through November 2014; the stay has now ballooned to an estimated date for Petitioner to return home as late as August 2015.

24. The educators at Intermountain used the MCS's IEP until December 2013; from December 2013 to March 2014, there was no IEP in place.

25. Intermountain did not contact MCS about Petitioner in doing their planning.

CONCLUSIONS OF LAW

1. The Petitioners have the burden of proof in this matter, to show by a preponderance of the evidence, that the relief they seek is warranted under state and federal law. *Schaffer v. Weast, 546 U.S. 49 (2005).*

2. Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in Petitioners' favor. Rule 1360-4-1-.02.

3. The parents bear the burden of proving by a preponderance of the evidence that the IEP is inappropriate. *Schaffer v. Weast,* 126 S.Ct. 528 (2005); *Kings Local School District v. Zelazny*, 325 F.3d 724 (6th Cir. 724, 2003). The United States Supreme Court has held that an IEP comports with the standards of the IDEA if it is reasonably calculated to enable the child to receive some educational benefits. *Board of Educ. v. Rowley*, 458 U.S. 200 (1982).

4. The proposed program need not be the best one available, so long as it is appropriate. *Age v. Bullitt County Public Schools*, 673 F. 2d 141. 143 (6th Cir. 1982).

5. The 6th Circuit has held that parents are only entitled to reimbursement for private placement if: "a federal court concludes both that the public placement violated the IDEA and that the private school placement was proper under the Act." *Berger v. Medina City School District*, 348 F.3d 513 (6th Cir. 2003.

6. In determining whether the public placement violated the IDEA, the reviewing court must undertake a twofold inquiry: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Berger* @ 520.

7. The 6th Circuit has held that:

> "A procedural violation of the IDEA is not a *per se* denial of FAPE. Rather a procedural violation will constitute a denial of a FAPE only if it causes substantive harm to the child or his parents; such as seriously infringing on the parents' opportunity to participate in the IEP process, depriving an eligible student of an IEP, or causing the loss of educational opportunity."

Berger @ 520.

8. As part of providing a FAPE, school districts receiving funds under the IDEA are required to establish an IEP for each child with a disability. *Deal v. Hamilton County Bd. Of Educ.*, 392 F. 3d 840, 853 (6th Cir. 2004).

9. There are two parts – procedural and substantive – to a court's inquiry in IDEA suits. *Deal*, 392 F. 3d at 853. "First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. Second, the court must assess whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefits." *Deal*, 392 F. 3d at 853-54.

10. "A procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents." *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001). Substantive harm occurs when the procedural violations in question either "seriously infringe upon the parents' opportunity to participate in the IEP process" or "deprive an eligible student of an individualized education program or result in the loss of educational opportunity." Knable, 238 F.3d at 765-66.

11. In *Rowley*, the Supreme court developed a two-prong test for determining the sufficiency of a proposed IEP. First, it must be substantively appropriate by offering goals and objectives that are "reasonably calculated to provide education benefit" to the child. Second, the procedural safeguards of the IDEA must be provided to parents, including the right to participate in the development of the IEP and to receive notification and explanation of their rights.

12. In *Ashland School District v. E.H.,* 587 F. 3d 1175, the Ninth Circuit Court of Appeals held that **"the child's residential placement was necessitated by medical, rather than**

educational concerns." The Court of Appeals affirmed the district court's denial of the parents' request for reimbursement for the residential placement. Further, the Court of Appeals held that **the IDEA does not require a school district to address all of a student's medical concerns**.

ANALYSIS AND CONCLUSIONS OF LAW

1. The evidence presented at the hearing shows that MCS followed IDEA procedures and implemented and complied with IEPs designed to provide Petitioner with an educational benefit.

2. The evidence shows that Dr. B. was actively involved in planning Petitioner's IEPs, and that he approved of and signed the IEPs that were prepared for Petitioner.

3. Dr. B. testified that he believed the goals in MCS's IEPs were adequate. Petitioner made good educational progress at Northfield Elementary and at Mitchell-Neilson Elementary. Academically, he was a good student in spite of his behavioral difficulties.

4. Dr. B. testified that Petitioner's academic performance was not a relevant issue in his decision to remove Petitioner from Mitchell-Neilson Elementary.

5. Intermountain personnel did not contact MCS about Petitioner's needs in doing their planning. Not all children at Intermountain have IEPs, and if a child comes to Intermountain without an IEP, they don't create one. They do not conduct child find.

6. Marvin Williams, the educational director at Intermountain, and Jarrod Murgel, the classroom teacher at Intermountain, testified that MCS's IEP was appropriate. Intermountain used the MCS IEP until developing its own.

7. Intermountain is a residential treatment facility which treats children with psychological, psychiatric and emotional disorders. **It is not an educational placement within the meaning of the IDEA.** Intermountain is a residential treatment facility for children, which happens to have a school attached to it. It only secondarily educates children.

8. The resolution of this matter turns on a factual determination of whether Petitioner made educational progress while he was enrolled in MCS, whether the school district provided a Free Appropriate Public Education for Petitioner and whether Intermountain is an appropriate placement for Petitioner.

9. The evidence presented at the hearing shows that MCS followed IDEA procedures and implemented IEPs designed to provide Petitioner with an educational benefit. It is determined that Petitioner made academic progress while enrolled at Northfield Elementary and Mitchell-Neilson Elementary.

10. It is concluded that MCS provided the services that were outlined in Petitioner's IEPs. Petitioner's father approved and signed each IEP. MCS complied with Petitioner's IEPs.

11. It is concluded that Petitioner was placed at Intermountain because of his psychiatric problems, not because he did not receive educational benefits while enrolled at MCS.

12. It is concluded that the Intermountain program is inappropriate because it did not operate under an IEP for Petitioner for at least three months. The treatment plan was the document guiding Petitioner's education rather than an IEP. Intermountain does not perform child-find. The record does not indicate whether Intermountain is accredited by the State of Montana where it is located.

13. Petitioner did not require a residential placement for any educational reason.

14. Based on the foregoing proof, it is **CONCLUDED** that MCS provided Petitioner a Free Appropriate Public Education; MCS did not violate the IDEA; MCS did comply with Petitioner's IEPs; Petitioner's IEPs were reasonably calculated to enable him to receive some educational benefit; and, placement at Intermountain was for medical, not educational reasons.

It is therefore **ORDERED** that MCS is the prevailing party in this matter. Petitioners are not entitled to the relief sought or to any relief.

This Order entered and effective this 15TH day of DEC., 2014.

Joyce Carter-Ball
Administrative Judge